SOCIETE GENERAL

v.

PUBLIC FEEDMILL (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. D4-42-426-88]
13 JUNE 1989

COMPANY LAW: *Winding-up - Circumstances under which a petitioner may be allowed to wind-up a company - Section 218 Companies Act 1965.*

The petitioner, by way of a petition, seeks to wind-up the respondent company under the provisions of the Companies Act 1965. The respondent was indebted to the petitioner in the sum of RM1,920,182.79 together with interest in respect of 2 banker's guarantee issued by the petitioner in favour of 2 banks at the request of the respondent.

However, the respondent, debenture holders and the unsecured creditors had requested that the petition be stood over for a period of 18 months. There was a total amount of RM488,992.47 owed by the respondent to 12 unsecured creditors. The respondent was placed under receivership on 9 November 1987 by 2 banks. It was submitted that the respondent was still carrying on business amounting to RM500,000 a month. In support of its contention, the respondent cited 3 English cases.

Held:

[1] The circumstances in the 3 English cases cited above were entirely different from the circumstances in the present case. Here, the respondent company was already under receivership and admitted owing the respondent the sum of RM1,920,182.79. The total debt due to the 12 unsecured creditors was only RM488,992.47 and with regard to the debenture holders, the security can almost cover the debts.

[2] From the evidence, the prospect of the respondent company recovering and paying its debts to all its creditors under the present situation do not appear to be good at all. The promise that the respondent company might increase its production was mere speculation. It is evident that the respondent company was unable to pay its debts. The petitioner being the biggest unsecured creditor is entitled to a winding-up order.

[Petition allowed.]

Cases referred to:
Re St. Thomas' Dock Company [1976] 2 Ch 116
Re Southard & Co. Ltd. [1979] 3 All ER 556
Re ABC Coupler & Engineering Co. Ltd. [1961] 1 All ER 354

Legislation referred to:
Companies Act 1965, s. 218

For the petitioner - S.K. Thean; M/s. C.S. Tang & Co.
For the respondent - T.G. Lim; M/s. T.H. Su & Co.

JUDGMENT

Zakaria Yatim J:

In this petition the petitioner is seeking the order of the Court that (1) the respondent company be wound-up under the provisions of the Companies Act 1965; (2) the official receiver be appointed as provisional liquidator of the respondent company; and (3) the costs of this petition be paid out of the assets of the respondent company.

The petitioner is a company incorporated in the Republic of France. The respondent was incorporated under the Companies Act on 5 April 1976. Its registered office is at Lot 1922, Batu 6, Jalan Bukit Kemuning, Kampong Jawa, Klang.

According to the petition the respondent was indebted to the petitioner in the sum of RM1,920,182.79 together with interest thereon at Singapore inter banks rate (SIBOR) from 10 December 1987 until the date of full payment in respect of two banker's guarantees of RM1,000,000 each issued by the petitioner in favour of Arab-Malaysia Merchant Bank and Bank of America, Kuala Lumpur respectively at the request of the respondent. Upon demands made by the respective parties pursuant to the said banker's guarantees, the petitioner paid out to the Bank of America RM1,000,000 on 2 December 1987 and RM1,000,000 on 10 December 1987 to Arab-Malaysia Merchant Bank Bhd. After off-setting a sum of RM80,776.11 pledged with the petitioner by Domin-Damina Holdings (M) Sdn. Bhd. who stood as guarantor for the respondent and adding accrued interest amounting to RM958.90, a sum of RM1,920,182.79 remained due and owing to the petitioner. The petitioner had made application to the respondent for payment of its debt by a letter of demand dated 5 May 1988 and a statutory notice dated 8 June 1988 to its registered office at Lot 1922, Batu 6, Jalan Bukit Kemuning, Kampong Jawa, Klang but no payment had been received from the respondent after service of the said notice. More than twenty-one days had passed since the demand was made, but the respondent had neglected to pay or satisfy the said sum in whole or in part or to make any offer to the petitioner to secure or compound the same.

Mr. Lim Counsel for the respondent, debenture holders and insecured creditors, in his submission asked for the petition to be stood over for a period of eighteen months. He referred to the list of twelve unsecured creditors, who also opposed the petition. The total amount owed by the respondent to the twelve unsecured creditors was RM488,992.47. Mr. Lim also referred to the affidavit of Encik Mohd. Hassan Dato Merican who was appointed receiver and manager over the properties of the respondent. The respondent was placed under receivership on 9 November 1987 by two banks, namely Deutsche Bank Aktiengesellschaft and Standard Chartered Bank pursuant to two separate debentures. According to Mr. Lim the respondent was still carrying on business worth about RM500,000 a month. In support of his contention that the petition be stood over for a period of eighteen months he cited three English cases. The first case was *in re St. Thomas' Dock Company* [1976] 2 Ch. 116. In that case a petition was presented by a person who claimed to be a creditor for 77 pounds 9s 6d for arrears of interest on principal moneys lent by him to the respondent company. The petition was opposed by the respondent company, by debenture holders to the amount of 70,000 pounds and by the principal unsecured creditor who claimed that the company owed him 5,000 pounds. There was no evidence that the respondent company had assets worth beyond the amount of the debentures. The Court held that the petition must stand over for six months. The second case was *re Southard & Co. Ltd.* [1979] 3 All ER 556. In that case the Court of Appeal upheld the decision of the High Court Judge who dismissed a petition for winding-up. The facts of that case were as follows: A subsidiary company in a group of companies owed money to both the parent and an associated company of the group. In September 1987 the parent company (the petitioning creditor) initiated the voluntary

liquidation of the debtor company and attempted to secure the appointment of its nominee as the voluntary liquidator. The debtor company passed a resolution appointing as the voluntary liquidators two accountants unconnected with the group. On 11 October, the petitioning creditor presented a petition for the compulsory winding-up of the debtor company. At the date of the hearing of the petition, the debtor company was unable to pay its debts. It was indebted to the petitioning creditor and the supporting creditors in the aggregate sum of 21,488 pounds. At the same time there were independent creditors of company to whom the company was indebted in aggregate in the lesser sum of 13,226 pounds. The independent creditors opposed the petition on the ground that investigation of the company's affairs under the voluntary liquidation would be more effective. The learned Judge took the view that voluntary liquidation should continue and dismissed the petition. The third case was *re ABC Coupler & Engineering Co. Ltd.* [1961] 1 AA ER 354. In that case the judgment creditor of a company for 17,542 pounds 18s 3d petitioned for an order that the company be compulsorily wound-up. The petition was opposed by a number of creditors to whom the company owed about 18,328 pounds. There were no creditors supporting the petition. The company had extensive goodwill, and at the date of the petition had orders amounting to 110,000 pounds. The statement of the company's final position on 31 August 1960 showed an excess of assets over liabilities amounting to 689.87 pounds. The Court held that an order for winding-up should not be made.

In my opinion the circumstances in the three cases cited above were entirely different from the circumstances in the present case. In *St. Thomas* case the creditor presented a petition for a debt of 77 pounds 9s 6d when the company was indebted to debenture holders for 70,000 pounds and to an unsecured creditor for 5000 pounds. In *re Southard*, the company was indebted to its parent company and an associated company for 21,488 pounds. But at the same time the company was indebted to independent creditors for 13,226 pounds. In *Coupler* case the company's accounts were in excess over liabilities amounting to 689,687 pounds.

In the present case the respondent company was already under receivership and admitted owing the petitioner in the sum of RM1,920,182.79. The total debt due to the twelve unsecured creditors is only RM488,992.47. With regard to the debenture holders, the security can almost cover the debt. In Mohd Hassan's affidavit he stated in para. 6:

> I aver that as 30 September 1988 the particulars of the accounts of the company are as follows:
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> (a) the total amount due to Public Feedmill (M) Sdn. Bhd. to the banks under debenture was RM6,859,652.04.
>
> (b) The security is estimated to realise a sum of RM6,004,021.08 as appeared in the statement of affairs to the company.

Encik Mohd. Hassan averred that the respondent, under receivership was showing sign of recovery. In trying to justify that he was doing a good job as receiver and manager of the respondent company. But from the evidence the prospects of the respondent company recovering and paying its debts to all its creditors under the present situation do not appear to be good at all. In para. 12 of his affidavit, Encik Mohd. Hassan said:

> I aver that the company is trading under the receiver and manager and is showing signs of recovery and I verily believe that in spite of the staid and slow economic climate of the country and cyclical and seasonal down turn of the farming (broiler) sector which results in the slow down of demand for the feed products of the company and the depressed price of the products of the company, there is a promising and good chance that the company may increase its production volumes to match the impending increase in the demand of the company's feeding products.

The promise that the respondent company might increase its production was a mere speculation. It is evident that the respondent company was unable to pay its debt. The petitioner being the biggest unsecured creditor is entitled to a winding-up order.

In the circumstances, I made an order for the winding-up of the respondent company. I also ordered that the Official Receiver be appointed as provisional liquidator of the respondent company. The costs of the petition to be paid out from the assets of the respondent company.

Also found at [1990] 1 CLJ 145